United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CHARLES O. FINLEY, SHIRLEY M. FINLEY, and CHARLES O. FINLEY & COMPANY, INC., Plaintiffs-Appellees, -against- PARVIN DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY and F.O.F. PROPRIETARY FUNDS, LIMITED, Defendants-Appellants.	No. 75-7354 APPEAL FROM AN ORDER OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK ENTERED MAY 14, 1975 PURSUANT TO 28 U.S.C. §1292(b)
PARVIN DOHRMANN COMPANY, INC., DELBERT W. COLEMAN, WILLIAM C. SCOTT, JESUP & LAMONT, JOHN J. DUNPHY & F.O.F. PROPRIETARY FUNDS, LIMITED, Petitioners, -against- HONORABLE INZER B. WYATT, U.S.D.J., Respondent.	No. 75-3032 PETITION FOR EXTRAORDINARY WRIT PURSUANT TO 28 U.S.C. §1651 AND FED. R. APP. P. 21

REPLY BRIEF FOR DEFENDANTS-APPELLANTS AND PETITIONERS

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REPLY BRIEF FOR DEFENDANTS-APPELLANTS AND PETITIONERS

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The key issue raised by this appeal and petition for mandamus is the one expressed in the question certified by the District Court. Namely, did the institution of the Individual Calendar Assignment system preclude dismissal of a case which otherwise should have been dismissed for failure to prosecute? (A-157).

Plaintiffs' answering brief is not so much an attempt to establish that Judge Wyatt was right in holding he was so precluded, as it is an attempt to show that he was wrong in concluding that plaintiffs had, indeed, failed to prosecute within the meaning of Rule 41(b).

We do not believe that affirmance is possible unless this Court agrees that the advent of the Individual Caldendar Assignment system precluded Judges in the Southern District from dismissing a case for failure to prosecute. Any attempt to sustain the decision below - as plaintiffs attempt to do - on the ground that the delay was excusable and that defendants were in no way prejudiced is totally without merit.

The Sham Issues: Excusable Neglect and Lack of Prejudice

"Sham" is a strong word - but plaintiffs' insistence on putting forth Mr. Finley's heart condition and a breakdown of communications as the reasons this case was not prosecuted, leaves us with no choice.

One of the two excuses relied on by plaintiffs is the three-year communications breakdown described in the Shelton affidavit (A-101). We treated this contention somewhat gingerly in our principal brief because we believed its inherent incredibility was apparent.* However, the excuse has now been dressed with the label "counsel's inadvertence" and is asserted more vigorously than ever in plaintiffs' answering brief (pp. 23-25).

The fact is, there was no lack of communication, inadvertent or otherwise, between Mr. Finley and either his New York counsel (Shea, Gould) or his Chicago counsel (William Myers of Rothschild, Barry & Myers).

During this period Mr. Myers was prosecuting an antitrust counterclaim on behalf of Finley in a Federal Court action in California.** Myers filed a brief and presented the oral argument on Finley's behalf to the Ninth Circuit in September 1973 and August 1974 respectively.

Finley and Myers were also in communication in November, 1973 (three months after Finley's heart attack) over

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* For example, we did not point out that while Mr. Shelton's affidavit (A-101) says his firm called Chicago counsel a number of times in the three-year period, it does not say what he was told. Thus, we cannot tell if Mr. Finley, as appears apparent, instructed his counsel not to proceed with the case.

** Twin City Sportswear, Inc. v. Charles O. Finley & Co., Inc., 365 F. Supp. 235 (N.D. Cal. 1972), rev'd and remanded, 512 F.2d 1264 (9th Cir. 1975).

$7,000 in fines levied against Finley by Baseball Commissioner Kuhn because of certain episodes stemming from Finley's active role in the 1973 World Series. According to newspaper reports, Myers and Finley appeared together in New York on November 16, 1973 for a meeting with Kuhn. A few weeks later when Finley announced his intention to sue Kuhn over the fines, Finley reportedly said that he had conferred with his Chicago law firm and was assured he had basis for suit.

Apparently after discussion with attorney Myers, Finley commenced legal action in federal district court in San Francisco on December 18, 1973 against Dick Williams, Finley's manager of the Oakland "A's", over Williams' right to manage the New York Yankees (Chas. O. Finley & Company, Inc. v. Richard H. Williams, N.D. Cal., Index No. 73-2266).* The following day, December 19, 1973, Finley testified in Boston before Joseph Cronin, President of the American Baseball League, in what amounted to an arbitration proceeding with respect to claims to Dick Williams' services. Finley was represented at that hearing by his Chicago counsel, William Myers. (Transcript of Hearing Pursuant to Section 8.3 of the American Baseball League Constitution.)

More important, counsel of record in this case, Shea, Gould, were in touch with Mr. Finley "... a number of

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* An Associated Press report dated December 14, 1973, indicated that Finley and Myers were working together over legal or other action with respect to Dick Williams and that Finley had referred reporters to Myers.

times in the last three years ..." about this very matter. Thus, counsel for plaintiffs stated to Magistrate Schreiber at the pretrial conference just prior to the motion to dismiss:

> "We were in contact with Mr. Finley a number of times in the last three years and each time there was a different proposal for settlement, not a proposal that [sic, read "but"] a different comment by him on the settlements that he thought might be worked out and [sic, read "as"], for example, just recently, a tender offer for the stock.
>
> "We did not proceed with discovery. I'll concede there has been no activity in the case for the last two [three ?] years." (A-62,63).*

Therefore, the communications breakdown described in the Shelton affidavit can be characterized by no other word than sham. Communications did not break down - due to counsel's inadvertence - or for any other reason. There was a deliberate - and inexcusable - failure to prosecute.**

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* At no time were any of Mr. Finley's views on settlement presented to defendants. Indeed, there was absolutely no communication from plaintiffs on any subject including the possibility of settlement since the execution of the stipulation adjourning the depositions on April 5, 1972.

** Plaintiffs' reliance on Reizakis v. Loy, 490 F.2d 1132 (4th Cir. 1974) is misplaced. There the action had been pending for less than 1 1/2 years; plaintiff had every reasonable expectation to believe that his counsel had complied with the local court rules and plaintiff himself had taken steps, such as advancing witness fees, in anticipation of the trial. More important, plaintiffs' entire thesis is contrary to the rule announced by the Supreme Court in Link v. Wabash, 370 U.S. 626 633-34 (1962) and followed by this Court in Theilmann v. Rutland Hospital, Inc., 455 F.2d 853 (2d Cir. 1972) that a party cannot avoid the consequences of his attorney's acts or omissions to defeat a Rule 41(b) motion.

The ill-health excuse fares no better. We have shown in our principal brief that the one-year period in the Shelton affidavit (A-101, 102) in no way explains the inactivity in the three years preceding the attack. (That three-year period was interrupted only once for a brief period of discovery two years prior to Mr. Finley's heart attack in August, 1973.) Nor does it explain the inactivity in the eight months which followed the one-year period.*

The illness does not even adequately explain the lack of prosecution in the claimed one-year period. Certainly, the illness did not prevent Finley from taking an active role in the 1973 World Series, the Dick Williams affair, or the dispute with the Baseball Commissioner, all of which occurred within a few months after his attack. And certainly his counsel were not precluded during that one year from serving interrogatories or taking depositions. Moreover, as shown in our principal brief, the Shelton affidavit admits that during this period, Mr. Finley was engaged in "wide ranging business activities" and dealing with "other pressing matters ... on a day to day basis". (A-102).

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* This inactivity prevailed despite the fact that in August 1974 Mr. Finley had received the lengthy memorandum prepared by Shea, Gould, the response to which, according to the Shelton affidavit, would provide the basis for further discovery. (A-101).

In addition, it is now apparent that even the statement in the Shelton affidavit which try to give the impression that Mr. Finley was inactive on doctor's orders is without foundation. In support of that contention, Mr. Shelton states in that affidavit that:

> "Mr. Finley is, of course, the owner of the Oakland Athletics baseball team and, until recently, owned a professional hockey team and a professional basketball team which he tells me he disposed of in compliance with his doctor's orders to limit his activities." (A-102)

An action pending in the United States District Court for the Northern District of Illinois (L.B.B. Corporation v. Charles O. Finley & Co., Inc., Index No. 74 C 3258) and newspaper reports make clear that Mr. Finley had agreed to sell his basketball team prior to his heart attack.* Thus, Mr. Finley's statement to Mr. Shelton that the team was sold on doctor's orders is not in accord with the facts.**

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*Negotiations to sell the Memphis Tams to a group of Providence, Rhode Island businessmen were under way in May, 1973 and an agreement was announced the first week of June, 1973. The American Basketball Association refused to permit a move of the Tams from Memphis to Providence and the sale was never finalized. In June, 1974, the American Basketball Association itself purchased the Tams from Finley.

**Newspaper reports indicate that although the sale of Mr. Finley's hockey team did occur after the attack - negotiations leading to that sale began before that time, as early as March, 1973.

In view of the foregoing, the cases relied on by plaintiffs [Rankin v. Shayne Brothers, Inc., 280 F.2d 55 (D.C. Cir. 1960) and Jarva v. United States, 280 F.2d 892 (9th Cir. 1960)] provide them no support. In Rankin the Court of Appeals held it was error to dismiss a personal injury action where plaintiff had submitted a doctor's certificate showing he was under medical care during virtually the entire period of time between the Court's earlier reversal and remand following the first trial of the action and a subsequent motion to dismiss, and that plaintiff would have suffered a severe breakdown if the case had been re-tried during that period. The Jarva case did not arise under Rule 41(b), but was on appeal from a dismissal by the district court pursuant to a local rule that allowed the district court to dismiss an action in which there had been no activity for a six-month period. Since the suit was only a little over a year old, the appellate court held that it would have been grossly unfair to force plaintiff to trial when he was hospitalized during the six-month period prior to the district court's dismissal.

Plaintiffs recognize that the question of actual prejudice arises only if plaintiffs have succeeded in carrying their burden of showing excusable neglect. (Plaintiffs-Appellees' Brief, p. 25). Far from establishing excusable neglect, plaintiffs have been unable to make even a good faith effort to meet that burden. For that reason, and because

plaintiffs' answering brief raises no serious challenge to defendants' showing of actual prejudice, little space is devoted to that issue here.

However, the most serious misstatements of fact cannot be ignored.

First, plaintiffs state (p. 26) that "... nowhere in their brief do Appellants advance any ground for prejudice to the individual defendants (Coleman, Scott and Dunphy) other than the conclusory assertion that ... 'memories have failed'". That is not so. Defendants made clear in their brief that all defendants (including the individual defendants) were charged with liability for the Section 5 violation based upon the FOF sale to plaintiffs, and, "Thus all defendants are prejudiced by the death of Mr. Cowett." (Appellants' Brief, p. 36). In addition, it was pointed out (p. 35) that important employees of Parvin Dohrmann during the period relevant to plaintiffs' complaint are now unavailable. Obviously, such unavailability prejudices the individual defendants.*

Second, plaintiffs state: "It is not disputed that Mr. Cowett had nothing whatever to do with FOF's purchase of 81,000 shares of Parvin Dohrmann stock in January of 1969"

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* Parvin Dohrmann's house counsel, who had knowledge, for example, concerning the preparation of forms filed with the SEC, left the Company in the fall of 1971, 1-1/2 years after this suit was commenced; the financial officer, with knowledge, for example, of projections for the Company, departed a few months later (nearly 2 years after this suit was filed); and the corporate secretary who had knowledge of trading activities in the company stock and its statements to the press left in August, 1974.

(p. 27). That is not so. Defendants stated in their brief that "Mr. Cowett ... had knowledge of the circumstances of the earlier Coleman sale of those shares to FOF." (Appellant's Brief, p. 36). Moreover, plaintiffs' reliance on answers to interrogatories filed in a related action (which they did not refer to accurately),* led to a reply to this Court on behlaf of FOF in which it was pointed out that in response to one of those interrogatories it was stated that "Bernard Cornfeld and Edward Cowett, former directors of FOF, may have additional information in this regard" [i.e., knowledge of those who participated in the purchase of Parvin Dohrmann stock by FOF and others]. See Reply In Support of Petition For Leave to Appeal Or For A Writ of Mandamus, pp. 5-6.

Third, plaintiffs state (p. 27): "Indeed the evidence ... shows beyond question that Mr. Cowett merely was involved in the decision as to the timing of the sale and not the decision as to whether the sale should take place." This is not so. FOF's reply clearly establishes that the evidence is to the contrary. The transcript of testimony before the SEC of Fred M. Alger, Jr., an investment advisor to FOF, reveals that Mr. Alger testified that "the decision [to sell] was really being made by Ed Cowett."

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* See Answer to Petition For Leave to Appeal Or For A Writ of Mandamus, p. 17.

Mr. Cowett, a key executive with FOF, would have been a key witness in this action, both on the Section 5 issue and on questions relating to manipulation and false filing charges.

Fourth, plaintiffs gloss over obvious prejudices to Parvin Dorhmann:

(1) Parvin Dohrmann cannot now rely upon cooperation from Coleman and Scott, since the interests of the Company and the individuals may well be in conflict;

(2) The total change in management, accomplished over the period of five years during which plaintiffs failed to prosecute their case, denies Parvin Dohrmann the testimony of management personnel who inherited the situation from Coleman and Scott and who would have been in a position to reconstruct the Company's activities while under the control of Coleman and Scott; and

(3) After the acquisition by Argent Corporation in late 1974 of Parvin Dohrmann in a tender offer in which plaintiffs participated, there has been a complete reorganization of management, a dissolution of the Company, and a housekeeping sweep of records and documents. Argent, successor to Parvin Dohrmann, finds itself in a position in which it may be unable to produce a single witness in its defense.

The Real Issue: Does the Individual Assignment System Preclude Dismissal?

The real issue in this matter, the one which we believe moved this Court to grant leave to appeal and to refer the question of mandamus to this panel has been understandably scanted by plaintiffs. There is, indeed, little that can be said in defense of the holding that the Individual Calendar Assignment system precluded dismissal here.

Plaintiffs' attempt to do so begins with the statement "... there has been no showing that this case could or would have been tried between mid-1972 [when the Individual Assignment system started] and the present time even had plaintiffs' counsel harassed the District judges to whom their case was assigned ...." (p. 3). First, the statement ignores the two years prior to that date during which plaintiffs could have filed a note of issue. Second, it is irrelevant whether or not plaintiffs could actually have gotten to trial. The point is they did nothing -- they made no attempt whatsoever to get to trial. We are not in this Court because the case did not get tried -- we are here because plaintiffs showed no signs of life for 3-1/2 years.

Third -- and most important -- contrary to plaintiffs' assertion, there has been a showing that this case "could or would have been tried" in the period in question.

Defendants' principal brief pointed out that a case with similar issues,* arising out of the same facts and commenced at about the same time as this case, was scheduled for trial and would have been tried in February, 1974, if it had not been settled on the eve of trial. Hence, it is plain that this case "could" have and "would" have been tried in the period in question, if plaintiffs had deigned to prosecute it.

Plaintiffs (in stating the issue, p. 4) also assert that the Court below found that "plaintiffs could not have obtained a trial ... during that three-year period." The Court did not so find. It only found that there was no mechanism by which plaintiffs could make known their readiness for trial. The Court did not say no trial would have been possible if that alleged readiness had been made known and there is no support in the record, or elsewhere, for such contention. Such a finding, if it had been made, would have been in error, in light of the 20th Century case.

Plaintiffs next attempt to defend the holding below by rewriting it. Thus, on page 13 of their brief they assert that the motion to dismiss was motivated by three factors, including the fact that defendants did nothing in respect to a motion to dismiss until the case was called for a pretrial conference. But Judge Wyatt made it "abundantly clear" there

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*20th Century Investors, Inc. v. Jesup & Lamont, et al., S.D.N.Y., 70 Civ. 2597.

was only one reason for denial of the motion:

> "The only reason--and I have made it, I think, abundantly clear--the only reason that I don't dismiss the action for failure to prosecute is that I see no machinery under our present system for getting a case tried if you are the plaintiff, outside of writing letters and telephoning the judge." (A-147).

Moreover, it is also abundantly clear that the Court was correct in not regarding defendants' behavior as a reason for denial of their motion. Under the law, that behavior provides no excuse for plaintiffs' failure to prosecute. S&K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., 58 F.R.D. 4, 7 (E.D. Pa.), aff'd without opinion, 491 F.2d 751 (3d Cir. 1973).

In addition, plaintiffs' attempt to give the impression that after the informal production of documents by certain defendants in early 1972 they had completed their discovery, suggesting that from that point on the progress of this case to trial was the responsibility of the District Court and because the Court did nothing for the next 3-1/2 years, they cannot be faulted for failure to prosecute. But this attempt to shift the onus to the Court is not only contrary to law,* its sincerety is suspect.

Defendants have previously taken issue with the contention that the early 1972 discovery has put plaintiffs in position to try this case; and as plaintiffs point out

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* S&K Airport Drive-In, Inc. v. Paramount Film Dist. Corp., supra, 58 F.R.D. at 7; Bendix Aviation Corp. v. Glass, 32 F.R.D. 375, 377 (E.D. Pa. 1962), aff'd per curiam, 314 F.2d 944 (3d Cir.), cert. denied, 375 U.S. 817 (1963).

(p. 12), we have "made much" of the inconsistency between the assertion that plaintiffs were ready for trial by virtue of the 1972 document production and the fact that plaintiffs served extensive discovery demands upon learning of the motion to dismiss. Quite frankly, we have made much of this inconsistency because it cast serious doubt on the plaintiffs' bona fides. Either the assertion that it was unnecessary to pursue the adjourned depositions because plaintiffs were ready to go to trial based upon the 1972 disclosures is suspect, or the discovery notices served when informed of this motion were not served in good faith.

Plaintiffs' labored attempt to reconcile the two positions (see footnote, p. 12), does nothing to restore confidence in their candor. In fact, it makes matters worse. [How much better it would have been (in regard to plaintiffs' credibility) if they had forthrightly admitted either that they indeed needed further discovery or that the lately served discovery was an ill considered, panicky attempt to defeat the motion to dismiss.]

Indeed, plaintiffs' treatment of this issue, when taken together with the concocted communications gap and the illness excuse, demonstrate, we respectfully suggest, somewhat less respect for the Court than is expected. That, in itself, is good reason for refusing, as the District Court did, to indulge plaintiffs' failure to prosecute.

Plaintiffs' argument fails not only in what it attempts to do, but what it fails to undertake. Thus, plaintiffs have failed to answer the argument that they needed no formal mechanism to announce their readiness for trial. They do not deny that they could have written a letter or telephoned the chambers of the Judges to whom the case was assigned. Nor do plaintiffs explain why they did not do so. Instead they seize on the paragraph in our brief which points out that if Judge Wyatt was right in holding that a formal device was necessary, it was available to plaintiffs,* and chide us for not referring to Rule 3216(b) of the CPLR which requires a defendant to take affirmative action before making a motion to dismiss. However, the two rules are unrelated. CPLR 3402 was suggested only to fill the void that Judge Wyatt erroneously felt existed in the District Court's rules and practice. But it simply does not follow from that suggestion that the Court must also read into Rule 41(b) a burden on defendants which is at variance with the practice, procedure and decisional law in the federal courts.

In our principal brief we pointed out that the statements as to the merits of the case contained in plaintiffs' Answer To The Petition were not only irrelevant to the Rule 41(b) issues, but were blatantly conclusory, unsupported by the record, and based on the same facts which led to a

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*See Rule 15 of the Civil Rules of the District Court and Rule 3402 of the New York Civil Practice Law and Rules.

settlement in the class action described by Judge Metzner as a "windfall" to the "so-called injured stockholders". Plaintiffs' latest submission to the Court does nothing to dispel those contentions. Indeed it is significant that the only conversations between Mr. Finley and New York counsel in the last three years consisted exclusively of discussions of settlement possibilities (A- 62,63); not a word about prosecuting a case which plaintiffs now claim "has obvious merit."

Plaintiffs also try to create the impression that this case deserves to be tried because it has importance in the securities law field beyond plaintiffs' own personal interest. Nothing could be further from the truth. There is nothing in this case that takes it out of the mainstream of ordinary securities law litigation; and to the extent the public had an interest in the events giving rise to this suit, those interests were vindicated by the SEC and Judge Palmieri in SEC v. Parvin Dohrmann Company, et al., (S.D.N.Y. Index No. 69 Civ. 4543). Similarly, the interests of the Parvin Dohrmann shareholders were vindicated by Judge Metzner in approving the class action settlement in Moseley, et al. v. Scott, et al., (S.D.N.Y. Index No. 69 Civ. 4574). This then is nothing more than a private fight, and one in which plaintiffs have shown no interest in pursuing. Whatever its merit (and we submit it has none) it does not involve those kinds of interests which would allow the Court to overlook either plaintiffs' inexcusable failure to prosecute or the real prejudice to defendants.

CONCLUSION

This Court should reverse the District Court's decision and dismiss the complaint herein for failure to prosecute under Rule 41(b) of the Federal Rules of Civil Procedure or, in the alternative, issue a Writ of Mandamus to the Honorable Inzer B. Wyatt, United States District Judge for the Southern District of New York, directing him to dismiss the complaint herein on that ground.

Dated: New York, New York
July 15, 1975

Respectfully submitted,

ROSENMAN, COLIN, KAYE, PETSCHEK,
FREUND & EMIL
575 Madison Avenue
New York, New York 10022

JENNER & BLOCK
One IBM Plaza
Chicago, Illinois 60611

Attorneys for Appellant-Petitioner
Parvin/Dohrmann Company, Inc.

TOWNLEY, UPDIKE, CARTER & RODGERS
220 East 42nd Street
New York, New York 10017

Attorneys for Appellants-Petitioners
Delbert W. Coleman and
William C. Scott

CARRO SPANBOCK LONDIN RODMAN
& FASS
10 East 40th Street
New York, New York 10016

Attorneys for Appellants-Petitioners
Jesup & Lamont and
John J. Dunphy

MILGRIM THOMAJAN & JACOBS, P.C.
25 Broadway
New York, New York 10004

Attorneys for Appellant-Petitioner
F.O.F. Proprietary Funds, Ltd.

Copy rec'd
W Peter B
Law clerk to Judge Wyatt